Supreme Court, U.S.
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In The

Supreme Court of the United States

ROY AGELOFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROY AGELOFF
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Petitioner

58 pp

QUESTIONS PRESENTED

1. Whether the district court can extend indefinitely the 90-day statutory time limitation set out in the Mandatory Victims Restitution Act, codified under Title 18 U.S.C. § 3663A(d) and pursuant to the procedures set forth in 18 U.S.C. § 3664(d)(5), in order to allow the government time to identify the victims and their losses?

2. Whether the district court's allowance of the government to identify the victims and their losses beyond the statutory time limitation period of 90-days under Title 18 U.S.C. § 3664(d)(5) can be considered harmless error and a defendant is not entitled to enforce that 90-day limit without showing that the delay caused prejudice to his or her defense?

3. Whether the Supreme Court should resolve the split among the federal circuit courts on the question whether a district court may extend for any length of time or indefinitely the 90-day statutory time limitation period under Title 18 U.S.C. § 3664(d)(5)?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, ROY AGELOFF ("Mr. Ageloff"), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Second Circuit entered in the above referenced matter on April 16, 2003.

OPINIONS BELOW

The published opinion of the Second Circuit Court of Appeals vacating Mr. Ageloff's restitution order on direct appeal is reproduced in Appendix A hereto and reported at *United States v. Catoggio, et al.*, 326 F.3d 323 (2nd Cir. 2003). The mandate issued by the Second Circuit is reproduced in Appendix B. The judgment and commitment and restitution order entered by the United States District Court for the Eastern District of New York, dated August 24, 2001, is reproduced in Appendix C. The district court's order staying the post-conviction restitution proceedings is reproduced in Appendix D.

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with decisions of the federal appellate and district courts as more fully presented below. The questions to be resolved center around whether a district court can extend indefinitely a Congressionally mandated 90-day statutory time limitation period under the Mandatory Victim Restitution

Act. The instant petition is filed timely and within the 90-day statutory time limitation period.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18 U.S.C., SECTION 3663A.

§ 3663A. Mandatory restitution to victims of certain cases.

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

Title 18 U.S.C., SECTION 3664

§ 3664. Procedure for issuance and enforcement of order of restitution.

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

* * *

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

* * *

(d)(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and **the court shall set a date for final**

determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for failure to include such losses in the initial claim for restitutionary relief.

* * *

STATEMENT OF THE CASE

I. Procedural History.

In 1998, the government indicted Mr. Ageloff, along with 54 individuals, for violating Title 18, United States Code, Sections 1962(c) and 1963, the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The charges stemmed from Mr. Ageloff's participation in a securities fraud scheme.

On August 24, 2000, Mr. Ageloff pleaded guilty to one count of RICO pursuant to a written plea agreement. One year later (August 24, 2001), the district court sentenced Mr. Ageloff to a term of 96-months imprisonment, three (3) years of supervised release and $80 million in restitution. Mr. Ageloff timely appealed the restitution part of his criminal sentence to the Second Circuit Court of Appeals. The district court, upon request of the government, extended indefinitely the 90-day statutory time limitation period set out in Title 18 U.S.C. § 3663A(d) and § 3664(d)(5) for the government to inform the sentencing court of the identities of the victims and amount of their losses.

On June 3, 2002, while the direct appeal was pending before the Second Circuit Court of Appeals, the government filed its victim restitution report, alleging for the first time the names of the victims and their losses.

On October 1, 2002, Mr. Ageloff, *pro se*, filed his objections to the government's victim's restitution report. Mr. Ageloff also filed a motion to strike the victims restitution report claiming it was time-barred under Title 18 U.S.C. §§ 3663A(d) and 3664(d)(5).

On January 24, 2003, the district court below entered an order directing that the aforementioned motions filed by Mr. Ageloff would be held in abeyance until a mandate was issued by the Second Circuit regarding the direct appeal case. *App. D.*

On April 16, 2003, the Second Circuit rendered its opinion and judgment in Mr. Ageloff's direct appeal. The Second Circuit vacated the restitution order of his sentence and remanded the case to the district court below for further proceedings consistent with the appellate court's opinion. *See, United States v. Catoggio*, 326 F.3d 323 (2nd Cir. 2003). The Second Circuit issued the mandate on May 12, 2003. *App. B.*

Mr. Ageloff is currently serving his federal sentence at FCC-Coleman (LOW), Coleman, Florida. The Custodian is P. LAIRD, Warden.

II. Facts.

"On August 17, 2001, in the absence of any request for a continuance by the government, the district court held a hearing for the purpose of imposing Mr. Ageloff's punishment. The government argued that the imposition of $80

million in restitution was not only warranted, but mandatory under the MVRA. In so doing, the government did not provide the sentencing court with the identities of the victims and their respective losses. Mr. Ageloff's former trial counsel contended that restitution was not mandatory, but discretionary since [Mr. Ageloff's] conduct occurred before, as well as after, the April 24, 1996 effective date of the MVRA." 363 F.3d at 326 n. 2.

The district court determined that restitution was mandatory and estimated the loss, in the absence of any reference to identified victims and/or their losses, to $80 million. The district court then pronounced the sentence from the bench: 96-months imprisonment, 3-years supervised release and $80 million in restitution. App. C. The sentencing court set forth a schedule of payments regarding restitution. The restitution order imposed by the court stated, in pertinent part:

> By consent of the parties, the names of the victims to whom restitution is owed and the losses sustained by each individual victim will be set forth in a separate Order of the Court, at such time, which may exceed 90 days from the date of this Order, as that information can be ascertained by the Court, on notice to the defendant, based on a proposal that shall be submitted by the United States Attorney.

Mr. Ageloff then took an appeal from the restitution order to the Second Circuit Court of Appeals. He claimed, among other things, that the sentencing court committed plain error by imposing restitution without having any information about the names of the victims and their losses. He further contended that the restitution order must be reversed without the ability to reimpose any

restitution since the government failed to file the required information about the victims and their losses within the 90-day statutory time limitation period set out in 18 U.S.C. § 3664(d)(5) of the MVRA.

Although the Second Circuit agreed that the district court committed plain error by imposing restitution in the absence of the requisite information about the victims and their losses, requiring vacatur of the restitution order and remand to allow the government to provide the court with the victims' names and their losses, the appellate court held that it was harmless error for the sentencing court not to enforce the 90-day statutory time limitation period under § 3664(d)(5). The appellate court opined:

> [T]he intent behind the 90-day period was not to protect defendants, but rather to protect victims from the willful dissipation of a defendant's assets. . . . Ageloff's attempt to invoke this provision in order to avoid paying restitution to the victims of his crime is unavailing.

326 F.3d at 330.

The appellate court ended its opinion of the case with the following notation and direction to the sentencing court:

> In view of the time that has elapsed since Ageloff's initial sentencing, we direct the district court to schedule sentencing hearing on restitution forthwith.

Id.

The instant petition followed. This case is now properly before this Court for review.

REASONS FOR GRANTING THE PETITION

The Petitioner, Mr. Ageloff, respectfully submits that the district court was prohibited to and otherwise exceeded its authority by extending indefinitely the 90-day statutory time limitation period under the MVRA notwithstanding the parties had consented to such an event. Furthermore, he respectfully contends the Second Circuit decision that the district court's error in doing so was harmless and would not bar further restitution proceedings or the government's ability to file the victims' restitution report beyond the 90-day period under § 3664(d)(5) was wrongly decided and contrary to other federal circuit and district courts' published decisions and decisions of this court.

This Court has recently decided to address the question whether a federal bankruptcy court can waive and otherwise extend the 60-day statutory time limitation period under a certain provision of the Bankruptcy Code, Title 11 U.S.C. By doing so, this Court will resolve the split of the federal district and circuit courts on this very question – a question which is similar to the one presented here by Mr. Ageloff, but under a criminal statute. *See, Kontrick v. Ryan*, U.S. No. 02-819, *cert. granted*, (4/28/2003).

"A federal court has the obligation to address a question of subject matter jurisdiction *sua sponte*. . . . it is also important to bear in mind that the parties may not confer jurisdiction by consent[.]" *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3rd Cir. 1999); *see also, United Indus. Workers v. Government of V.I.*, 987 F.2d 162, 168 (1st Cir. 1990) ("Because Article III of the Constitution restricts the subject matter jurisdiction of the federal

courts the consent of the parties cannot confer subject matter jurisdiction on a federal court."). Nor can a party ever waive its right to challenge the subject matter jurisdiction of a court. *Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982).

As in all statutory interpretation cases, courts begin with the statutory language. E.g., *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 760 (1999). Statutory terms or words will be construed according to their ordinary common meaning unless they are specifically defined by the statute or the statutory context required a different definition. E.g., *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207, 117 S.Ct. 660, 664 (1997). This Court has repeatedly held:

> "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. [Citations omitted]. When the cords of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701 (1981)); *see also, United States v. Gonzales*, 520 U.S. 1, 6, 117 S.Ct. 1032, 1035 (1997) ("Given [a] straightforward statutory command, there is no reason to resort to legislative history.").

THE MANDATORY VICTIM RESTITUTION ACT; 90-DAY TIME LIMITATION PERIOD UNDER 18 U.S.C. § 3664(d)(5)

The controlling statute provides that:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90-days after sentencing.

18 U.S.C. § 3664(d)(5).

Federal circuit courts "have read this provision as requiring the district court to enter the restitution order within 90 days of sentencing." *United States v. Maung*, 267 F.3d 1113, 1120-21 (11th Cir. 2001) (*citing United States v. Jolivette*, 257 F.3d 581, 584 (6th Cir. 2001) ("[W]hen the 90-day clock runs out, the judgment of conviction and sentence, including the restitution provision, becomes final by operation of the statute. . . . [B]ecause there was no timely judicial determination of the restitution amount, the judgment contains no enforceable restitution provision."); *United States v. Grimes*, 173 F.3d 634, 639-40 (7th Cir. 1999) (same).

Unlike the Second Circuit's holding in the case *sub judice*, the Six, Seventh, and Eleventh Circuits have concluded that the 90-day period under § 3664(d)(5) is mandatory, requiring strict compliance by the government and the district courts. In *Maung*, the Eleventh Circuit, in agreeing with its sister circuits in *Jolivette* and *Grimes*, *supra*, held:

> We agree with this reading of the statute. If the court believes more time is required to ascertain the amount of victim losses, it can postpone sentencing and thereby put off the start of the 90-day period. What a court generally may not do, however, is impose a sentence and then delay determination of the amount of losses more than 90 days from sentencing."
>
> * * *
>
> The government argues that the 90-day limit was designed by Congress to protect victims against the dissipation of a defendant's assets, and not to protect defendants against a drawn-out sentencing process [citation omitted]. Vacating the restitution award against Maung for untimeliness will, according to the government, thwart Congressional intent behind the 90-day provision by denying Maung's victims any repayment at all. But we are governed by the language Congress enacts, not by purported designs or intentions that conflict with that language. *See, INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53, 107 S.Ct. 1207, 1224, 94 L.Ed. 2d 434 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions.").

Maung, 267 F.3d at 1121.

The appellate court below, in rejecting Mr. Ageloff's argument that "the 90-day window is mandatory," 326 F.3d at 330, opined:

> We also note that the intent behind the 90-day period was not to protect defendants, but rather to protect victims from the willful dissipation of a defendant's assets. [citation and quotation omitted]. Ageloff's attempt to invoke this provision in

> order to avoid paying restitution to the victims of his crime is unavailing.

326 F.3d at 330.

In a very contrasting view in *Jolivette*, *supra*, the Sixth Circuit held:

> We believe that the statute makes clear the congressional intent to prohibit courts from making restitution determinations after the statutory period has run. But even if we found Congress's silence on the issue of what occurs, if as in this case, the court does not make such determination, we would apply the well-settled rule requiring any ambiguity in criminal statutes be resolved against the government and in favor of the criminal defendant. *Staples v. United States*, 511 U.S. 600, 619, n.17, 114 S.Ct. 1793, 128 L.Ed. 2d 608 (1994) (rule of lenity requires that "ambiguous criminal statute[s] ... be construed in favor of the accused").
>
> Accordingly, we hold that when the 90 day clock runs out, the judgment of conviction and sentence, including the restitution provision, becomes final by operation of the statute.... It follows that because there was no timely judicial determination of the restitution amount, the judgment contains no enforceable restitution provision. *See, United States v. Weir*, 861 F.2d 542, 546 (9th Cir. 1988).

Jolivette, 257 F.3d at 584-85.

In creating a plethora of criminal and civil statutes, Congress has on occasions inserted time limitation periods. For example, Title 21 U.S.C. § 851(a)(1) requires the government to file an information seeking an enhanced

sentence prior to the commencement of trial – miss that statutory time limitation period by the prosecutor, the government is forever "prevent[ed]," "preclude[d]," and "bar[red]" a sentence enhancement. *United States v. Levay*, 76 F.3d 671, 674 n.4 (5th Cir. 1996); *see also, United States v. Smith*, 984 F.2d 1084, 1087 (10th Cir. 1993) (holding that noncompliance with section 851(a)(1) deprives the trial court of "authority" to impose an enhanced sentence); *United States v. Belanger*, 970 F.2d 416, 418 (7th Cir. 1992); *United States v. Williams*, 899 F.2d 1526, 1529 (6th Cir. 1990) (same); *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983) (same); *United States v. Allen*, 566 F.2d 1193, 1196 (3rd Cir. 1977) (same), *United States v. Noland*, 495 F.2d 529, 531 (5th Cir. 1974) (collecting cases to support the proposition that substantial compliance sufficed). Another example is the ten-day deadline under Fed. R. Civ. P. 59(e) which is jurisdictional and may not be extended by waiver, agreement of the parties or by the court. Fed. R. Civ. P. 6(a); *U.S. Leather, Inc. v. H&W Partnership*, 60 F.3d 222, 225 (5th Cir. 1995); *Hope v. United States*, 43 F.3d 1140, 1143 (7th Cir. 1994).

Other federal statutes and rules clearly set out a time limitation period, which if missed by the litigant would bar his or her claims for relief or action. Cf. e.g., Title 28 U.S.C. § 2255 (Amended) (one-year time limitation period to file motion to vacate . . . conviction and sentence); *RHI Holding Inc. v. United States*, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998) (holding, in a suit seeking a tax refund, that there was no implied equitable exception to the limitation period codified at 26 U.S.C. § 6532(a)); Title 28 U.S.C. § 2401(b) (six-month time limitation period for commencing Federal Tort Claim Act action, from date the notice of denial of claim by agency was mailed to claimant);

§ 504(a)(2) of Equal Access to Justice Act ("EAJA") (30-day period for pursuing an application for fees and expenses).

This Court has on several occasions deemed certain statutory time limitation periods "mandatory and jurisdictional." *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556 (1978) (30-day time limitation period under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107 is "mandatory and jurisdictional"); *United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282 (1960) (same); *see also, Fallen v. United States*, 369 U.S. 438, 442, 82 S.Ct. 917 (1962); *Matton v. Steamboat Co. v. Murphy*, 319 U.S. 412, 415, 63 S.Ct. 1126 (1943) (The purpose of the rule is clear: "Any other construction of the statute would defeat its purpose.").

Unlike in Rule 4 of Federal Rules of Appellate Procedure where Congress specifically granted federal courts authority under limited circumstances to extend the time limitation period for filing a notice of appeal from judgment entered, *see, Mendes Junior International Company v. Banco Do Brasil, S.A.*, 215 F.3d 306, 312 (2nd Cir. 2000) ("The power of the federal courts to extend the time limits on the invocation of appellate jurisdiction is severely circumscribed."), § 3664(d)(5) of the MVRA does not provide any room for the district court below to extend the time for the government to file the victim restitution report identifying the victims and their losses beyond the 90-day statutory period or final determination of losses. *Maung*, 267 F.3d at 1121.

"When Congress enacts statutes creating public rights or benefits, it can impose time limits on their availability. These time limits can either completely extinguish the right or simply bar the remedy for enforcement." *Ellis v.*

General Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998) (*citing Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S.Ct. 1127 (1982) and *Holmberg v. Armbecht*, 327 U.S. 392, 395-96, 66 S.Ct. 582 (1946).

THE GOVERNMENT'S FAILURE TO FILE VICTIM RESTITUTION REPORT IDENTIFYING THEREIN VICTIMS AND THEIR LOSSES WITHIN § 3664(d)(5) 90-DAY STATUTORY TIME LIMITATION PERIOD AND DISTRICT COURT'S FAILURE TO ENTER RESTITUTION ORDER IDENTIFYING VICTIMS AND THEIR LOSSES REQUIRES REVERSAL OF RESTITUTION AND ORDER BARRING OF FURTHER RESTITUTION PROCEEDINGS.

There are now three federal circuits which, under the facts of the instant case, would have reversed the restitution order as opposed to the appellate court below vacating and remanding the case for further restitution proceedings, essentially giving the government a second shot at the restitution apple. Mr. Ageloff respectfully submits that the Eleventh Circuits' decision in *Maung*, the Sixth Circuit's decision in *Jolivette* and the Seventh Circuit's decision in *Grimes* were not only correctly decided, but consistent with the teachings of this Court with regard to the strict compliance with statutory time limitation period. Justice Scalia made it very clear – "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, [the courts] are not free to replace it with an unenacted legislative intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452, 107 S.Ct. 1207 (1987) (Scalia, J., concurring). Section 3664(d)(5) expressly gave the government 90 days to get all of the identities of the victims and their losses to the court after the

imposition of Mr. Ageloff's sentence. Notwithstanding the government had this information in their possession prior to the time of sentencing, *see*, 326 F.3d at 328 ("[P]resentence Report also noted that the government was 'in possession of trading records which identify the victims and their respective losses."), the government simply chose to wait nearly one year after Mr. Ageloff's sentencing hearing to provide the district court below with the prerequisite information in order to issue a lawful restitution order under MVRA. The government lost its right to seek restitution against Mr. Ageloff by intentionally and willfully failing to adhere to the strictures of MVRA and § 3664(d)(5). "Because the [government] failed to comply with these 'mandatory and jurisdictional' time limits, the judgment of the Court of Appeals must be Reversed." *Browder*, 434 U.S. at 271-72, 98 S.Ct. 556.

THE MVRA DOES NOT REQUIRE MR. AGELOFF TO SHOW HE WAS PREJUDICED BY GOVERNMENT'S FAILURE TO ADHERE TO 90-DAY STATUTORY TIME LIMITATION PERIOD UNDER § 3664(d)(5) NOR WAS THE HARMLESS ERROR ANALYSIS APPLICABLE TO FAILURE TO MEET THE 90 DAY DEADLINE UNDER MVRA.

The appellate court below concluded that the district court committed plain error by failing to identify the victims and their respective losses prior to and at the time of entering an order restitution. 326 F.3d at 328. However, when Mr. Ageloff sought to enforce the 90-day time limit under § 3664(d)(5), the Second Circuit held:

> "Ageloff surely was not prejudiced by a delay he consented to with the advice of experienced counsel."

326 F.3d at 330. The Second Circuit opined that the district court's failure to meet the 90-day time limit "can be considered harmless error and a defendant is not entitled to enforce that 90-day limit without showing 'that the delay caused prejudice to his or her defense.'" 326 F.3d at 329-30 (*quoting United States v. Stevens*, 211 F.3d 1, 5 (2nd Cir. 2000)).

Although the government was successful in convincing the Second Circuit to apply the harmless error analysis, it had failed miserably before the Eleventh Circuit in *Maung*. In rejecting the government's argument that *Maung* failed to show he was prejudiced by the government's delay under § 3664(d)(5), the Eleventh Circuit held: "But there is no prejudice requirement in the statute, and we are not convinced that we should read on into it." *Maung*, 267 F.3d at 1121; *see also United States v. Vasquez*, 7 F.3d 81, 84 (5th Cir. 1993) (Nowhere do the rules governing section 2255 suggest that a harmless error analysis is proper.); *United States v. Iasiello*, 166 F.3d 212, 214 (3rd Cir. 1999) ("a violation of Rule 8(c) is not susceptible to harmless error.").

Even if the appellate court below was correct in requiring Mr. Ageloff to show prejudice flowing from the government, enormous delay in providing the sentencing court with the identities of the victims and their losses, which Mr. Ageloff respectfully submits it was not, the very fact that the government now, after 11 months from the date of imposition of his sentence, claims the loss sustained by the victims is nearly 2½ times more than originally ordered by the sentencing court, demonstrates

prejudice in its rarest form. The government will not only have defeated the strictures of the MVRA, but Congress's intent on bringing finality to a restitution proceeding and subsequent imposition of an order regarding same against a defendant.

In sum, "the statutory deadline for calculating the amount of restitution due has passed." *Jolivette*, 257 F.3d at 584. No victims have come forward within the 60-day period or the 90-day time limit under § 3664(d)(5). Nor has any victim requested or petitioned the district court below to reopen the matter based on cause (as permitted by § 3664(d)(5)) since Mr. Ageloff was sentenced. Given the unambiguous language of the MVRA, the comprehensive and express procedural and prerequisite requirements Congress wrote into the MVRA, it is evident that the government's belated filing of the victim restitution report containing the names of the victims and their losses is not only time-barred, but the district court below is precluded, prevented and otherwise barred from revisiting the restitution issue as a matter of law. Like *Maung*, *supra*, Mr. Ageloff respectfully submits that this Court should reverse the restitution order imposed by the district court and not allow the case to be remanded for further restitution proceedings as so ordered by the Second Circuit.

"The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valec*, 424 U.S. 1, 12 (1976). "In this situation, it is not plainly absurd to let the chips fall where the plain language of the [MVRA] statute indicates they should." *Maung*, 267 F.3d at 1122. When considering the integrity of the criminal justice system, the government and the

courts "should not be permitted 'to blow hot and cold'" on this issue, *Ohler v. United States*, 120 S.Ct. 1851, 1856 (2000) (Souter, J., dissenting), by reinterpreting the statute. The government must not be allowed to simply do what it wants, when it wants in the face of a Congressional statutory scheme and mandate.

CONCLUSION

WHEREFORE, the Petitioner, ROY AGELOFF, requests this Court to grant the instant petition for writ of certiorari, vacate the judgment of the Second Circuit, and reverse the restitution order of the district court below based on the foregoing argument and law. Mr. Ageloff further requests other relief this Court deems proper and just.

Respectfully submitted,

ROY AGELOFF
FCC-Coleman (LOW)
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2002

Argued: January 7, 2003 Decided: April 16, 2003

Docket No. 01-1367(L), 01-1481(CON)

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT CATOGGIO, ROY AGELOFF,

Defendants-Appellants.

Before: FEINBERG, F.I. PARKER and STRAUB, Circuit Judges.

Appeal form $80 million order of restitution imposed upon defendant by the United States District Court for the Eastern District of New York (Dearie, J.) after plea of guilty to one count of racketeering. The order of restitution is vacated and the case remanded for further proceedings

NANCY C. WEAR, Coral Gables, FL (Hilliard E. Moldof, on the brief, for Defendant-Appellant.

PAUL SCHOEMAN, Assistant United States Attorney, Eastern District of New York (Alan Vinegrad, United States Attorney, Peter A

Norling, Assistant United states Attorney, on the brief), for Appellee.

FEINBERG, Circuit Judge:

Roy Ageloff appeals from an August 2001 order of restitution imposed by the United States District Court for the Eastern District of New York (Dearie, J.). The court ordered restitution under the Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A, in the amount of $80 million following Ageloff's argues that restitution should not have been ordered under the MVRA because that statute specifically does not apply where the victims of a crime and their losses are unidentifiable or their numbers are too large for restitution to be practical. He further argues that even if the MVRA applies, the district court erred in not following the procedures outlined in that statute. For the reasons stated below, we vacate the restitution order and remand for further proceedings.

I. Background

In August 2000, Roy Ageloff pled guilty to Count One of a 34-count superseding indictment charging him and 55 co-conspirators with engaging in a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and 1963. Count One accused the defendants of conducting a RICO enterprise to perpetrate fraud against members of the investing public in connection with the purchase and sale of certain stocks. The Presentence Report ("PSR"), prepared in November 2000 by the Probation Office, details the following about the pattern of racketeering activity designed by Ageloff to obtain tens of millions of

dollars for himself and other members of the enterprise at the expense of unwary consumers.

From 1991 to 1998, Ageloff and his partner Robert Catoggio controlled four securities brokerage firms: Hanover, Sterling & Co., Ltd., Norfolk Securities Corp., PCM Securities, Limited, L.P., and Capital Planning Associates, Inc. The racketeering activity in each of these four firms followed a similar pattern. Defendants acquired control over large blocks of stock and stock warrants of various small start-up companies, as well as companies that did no business at all (referred to in the indictment as "house stocks"). Defendants often acquired these house stocks cheaply, sometimes by paying kickbacks to the principals of the stock issuers or in other improper ways.

After acquiring the house stocks, defendants used various methods to create artificial market demand for those stocks. For example, the brokerage firms would pay large undisclosed commissions (as high as 20-30% of the price of the stock) to brokers based on the amount of the particular house stock a broker sold. These large commissions, which were not paid to brokers for selling non-house stock or for buying house stock from consumers, encouraged brokers to aggressively tout the house stocks to the public. Brokers routinely informed customers that a nominal commission or no commission would be charged.

In addition, Ageloff and his co-conspirators used high-pressure sales tactics and misleading statements to persuade customers not to sell house stocks. They would praise the business prospects of the house stock companies, even though many of the companies did little or no business, and would assure their customers that the price of the house stocks would rise rapidly. To maintain the

appearance of demand, brokers would often either fail to take and execute customer orders to sell house stocks or execute such a sale only if it could be "crossed" with a purchase of the same stock by another customer.

This scheme worked for a number of years. As the price of the house stock rose, Ageloff and his – coconspirators would sell their shares for substantial profit. However, in 1997, the Federal Bureau of Investigation began to investigate the business practices of all four firms. That investigation led to the indictment of 55 defendants, including Ageloff, for participating in the scheme outlines above.

In august 2000, Ageloff pled guilty to one count of racketeering in violation of RICO. Ageloff's plea agreement included an estimate of the applicable Sentencing Guidelines calculation. By agreeing to the plea, Ageloff stipulated to a sentence enhancement of 19 levels pursuant to U.S.S.G. § 2F1.1 (b) (1) (S) for fraud that amounted to losses exceeding $80 million, the highest loss bracket under the applicable 1997 Guidelines Manual. As to restitution, the plea agreement simply noted that restitution was "[a]pplicable, in an amount to be determined by the Court."

At the plea hearing, the district court made clear its intention to impose restitution "to the extent that specific victims can be identified." Regarding the victims, the PSR noted that "[d]ue to the thousands of victims affected by the defendants' conduct, it would be impractical to request Affidavits of Loss from each victim, but it is noted that the Government is in possession of trading records which identify the victims and their respective losses." The PSR

also noted that for sentencing guideline purposes, Ageloff was responsible for losses of more than $80 million.

Ageloff's sentencing hearing took place a year later in August 2001. At that time, the court imposed a sentence of 96 months in prison and three years of supervised release. With regard to restitution, however, the government had not yet provided the court with a list of identified victims and their actual losses. The court nonetheless imposed $80 million in restitution as part of Ageloff's sentence.[1] Following the imposition of restitution, Ageloff acknowledged on the record that he agreed w/ the government that the required victim information could be provided at a date beyond the 90 days otherwise specified in 18 U.S.C. § 3664(d)(5). Accordingly, the restitution order imposed by the court stated,

> By consent of the parties, the names of the victims to whom restitution is owed and the losses sustained by each individual victim will be set forth in a separate Order of the Court at such time, which may exceed 90 days from the date of this Order, as that information can be ascertained by the Court, on notice to the defendant, based on a proposal that shall be submitted by the United States Attorney.

The Court also imposed the following payment schedule with regard to restitution: Ageloff was required to pay $500,000 within 30 days of sentencing, another $500,000 within 30 days of his release from prison, and $10,000 per month thereafter as a condition of supervised release. This

[1] Ageloff was held jointly and severally liable for this amount with co-defendant Catoggio.

schedule was subject to modification based on periodic financial disclosure and was without prejudice to the government's ability to collect on the full amount of the judgment.

II. Discussion

Although appellant did not object to the restitution order in the district court, the claims he makes on appeal relate solely to that order. Ordinarily, when a defendant has failed to object to an order in the district court, we review the court's imposition of that order for plain error. *See United States v. Thompson*, 113 F.3d 13, 15 (2d Cir. 1997). We have made clear that "failure to object to the restitution order at the time of sentencing does not preclude appellate review because an improper order of restitution constitutes an illegal sentence and, therefore, plain error." *United States v. Kinlock*, 174 F.3d 297, 299 (2d Cir. 1999).

The restitution order in this case is governed by the MVRA,[2] which makes restitution mandatory for losses suffered by the victims of certain crimes including crimes such as Ageloff's that are perpetrated by fraud. 18 U.S.C. § 3663A(c) (1) (A) (ii). However, the MVRA applies only when "an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3363(c) (1)

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[2] At a pre-sentence conference in the district court, Ageloff argued that restitution was discretionary because his conduct occurred before, as well as after, the April 24, 1996 effective date of the MVRA. However, in *United States v. Boyd*, 239 F.3d 471, 472 (2d Cir. 2001), we upheld a sentencing court's application of the MVRA to a conspiracy that commenced before April 24, 1996 but continued thereafter.

(B). The MVRA also does not apply when the number of identifiable victims makes restitution impracticable or when determining complex issues of fact related to restitution would complicate or prolong sentencing to an intolerable degree. 18 U.S.C. § 3363A (c) (3).

The MVRA requires the sentencing court to impose restitution in "the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f) (1) (A); United *States v. Harris*, 302 F.3d 72, 75 (2d Cir. 2002) ("[T]he district court was required to order restitution and determine the amount thereof without consideration of the economic circumstances of the defendant."). The MVRA further provides that restitution be ordered and enforced according to the procedures outlined in 18 U.S.C. § 3664. *See* 18 U.S.C. § 3663A (d). We have explained those procedures as follows:

> This section requires, among other things, a sentencing court to direct the probation officer to prepare a presentence or other report detailing the losses sustained by each victim, any restitution stipulated by plea agreement, and the economic resources of each defendant ... The statute provides that if the amount of loss cannot be determined at least ten days before sentencing, "the court shall set a date for the final determination of the victim's losses, *not to exceed 90 days after sentencing.*" A victim may "petition the court for an amended restitution order" if the victim thereafter discovers additional losses and shows good cause for not including those losses in the initial restitutionary request.

United States v. Stevens, 211 F.3d 1, 4 (2d Cir. 2000) (emphasis added). Section 3664 also requires the district

court to determine a schedule for payment of restitution. 18 U.S.C. § 3664 (f) (2). In doing so, the court must consider the defendant's financial resources and other assets, his projected earnings, and his financial obligations. Id.

On appeal, Ageloff challenges the validity of the restitution portion of his sentence because the district court did not follow the requirements of the MVRA.[3] First, Ageloff contends that the MVRA is not applicable to his case, and therefore restitution was improper, because (1) the government was unable to identify any specific victims who suffered actual losses, (2) the number of victims is too large for restitution to be practicable, and (3) the factual issues involved in determining victims' losses were so complex that the need for restitution was outweighed by the burden on the sentencing process. Second, Ageloff argues that restitution in the amount of $80 million does not represent the amount of actual losses suffered by any identified victims. Third, Ageloff contends that all issues with regard to restitution must be, but were not, resolved within 90 days of sentencing despite his purported waiver of this statutory period. Finally, Ageloff argues that the court erred in setting the payment schedule because it did not consider his financial resources and other assets, his

[3] Ageloff's plea agreement included a general waiver of the right to appeal his conviction and sentence. Ageloff argues that this general waiver did not constitutes a waiver of the right to appeal any illegally imposed restitution, and the government has not challenged Ageloff's interpretation. *See United States v. Ready*, 82 F.3d 551 (2d Cir. 1996) ("we conclude that the waiver contained in Ready's plea agreement does not, under the circumstances presented, operate as a waiver of Ready's right to appeal his restitution penalty.")

projected earnings, and his financial obligations as required by § 3664 (f) (2).

At the outset, we recognize that the district court's approach to restitution in this case represents a creative approach to a difficult problem. Ageloff's crime resulted in thousands of victims and large losses. Although those victims and their losses are identifiable, it takes time to unravel the effects of a complex scheme of the type used by Ageloff and his co-conspirators to perpetrate this fraud. The district court apparently set restitution in an amount agreed upon by defendant and probably exceeding any sum the defendant will ever pay. Further, the court obviously knew that it would take time for the government to discover the identities of the victims and their actual losses, but believed restitution was an important part of Ageloff's sentence. The court thus obtained Ageloff's consent to extend the time for the government to provide such evidence beyond the 90-day limit in the statute. Although we believe the district court's efforts are understandable, we must agree with defendant that the methods employed were not in accordance with the procedures Congress set forth in the MVRA.

Although we agree with Ageloff's conclusion that the restitution order violated the MVRA, we do not agree with most of his arguments. We do not agree, for example, that the victims of his crime were unidentifiable. While the Pre-Sentence Report indicated that it would be impractical to request affidavits of loss from each victim, it also noted that the government was "in possession of trading records which identify the victims and their respective losses." Further, at oral argument before us the government indicated that a 1,700-page victim restitution report was submitted to the district court last summer. According to

the government, this report detailed $192 million in actual losses to approximately 10,000 victims.[4] Therefore, Ageloff's claim that the victims are unidentifiable is at best a disingenuous effort to avoid a consequence of his criminal behavior.

Furthermore, we find meritless Ageloff's argument that the number of victims is too large for restitution to be practical and that the issues involved in determining restitution are so complex that the need for restitution is outweighed by the burden on the sentencing process. *See* 18 U.S.C. § 3663A (c) (3). As the government correctly points out, this provision of the MVRA was intended to permit a sentencing court to forego restitution if the court determines that imposing and administering restitution would be unduly burdensome. Rather, it appears that the district court considered restitution an essential part of Ageloff's sentence. We therefore do not think the district court committed plain error in proceeding with restitution in this admittedly complex case.

We also reject Ageloff's argument that the district court failed to consider the required factors outlined in § 3664 (f) (2) before setting the restitution schedule. In *Kinlock* we held that a court need not make detailed factual findings on each of the required factors so long as the court makes some "affirmative act or statement" to demonstrate that it considered the required factors. The restitution order itself states unequivocally, "This Order is entered after the Court has fully considered the factors set

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[4] According to the government, Ageloff is currently challenging the victim restitution report pro se in the district court.

forth in 18 U.S.C. §§ 3663(a) (1) (B) and 3664 (f) (2)." Moreover, a substantial portion of the sentencing transcript contains a discussion of Ageloff's resources, potential earnings and financial obligations. Therefore, we find no error in the district court's determination of Ageloff's payment schedule.

In our view, however, the district court did err in ordering restitution to unidentified, as opposed to unidentifiable, victims and in an amount ($80 million) that may not represent the actual losses to those victims. The MVRA is clear that restitution can only be imposed to the extent that the victims of a crime are actually identified, 18 U.S.C. § 3663A (c) (1) (B). Identification of victims is a statutory prerequisite to the application of the MVRA. Additionally, identifying victims prior to imposing restitution ensures that those victims receive the pro-rata share of the restitution funds to which they are entitled. Therefore, although we believe the victims of Ageloff's fraud are identifiable, the court erred in not identifying them before ordering restitution. *See, e.g., United States v. Grimes*, 173 F.3d 634, 640 (7th Cir. 1999) (vacating restitution order issued before identification of victims and noting that "[t]he 90-day period for deferral of the order and the provision for amendment later are [Congress'] chosen method of dealing with the problem of unascertained victims").

As noted above, the MVRA also requires courts to order restitution in the full amount of the victims' losses. 18 U.S.C. § 3664 (f) (1) (A). However, neither the parties nor the district court below believed the $80 million figure was an accurate statement of the victims' losses in this case. Ageloff argues that the losses were significantly less; as indicated above, the government now contends before

the district court that the losses exceeded $190 million; and the district court made no indication that the $80 million figure was an estimate of actual loss. Cf. *United States v. Futrell,* 209 F.3d 1286, 1292 (11th Cir. 2000) (holding that restitution could be based on a reasonable estimate of losses when it would be impossible to determine the precise amount). Rather, it appears that the district court simply used the figure admitted in Ageloff's plea agreement for the purpose of setting the appropriate upward enhancement to the length of his incarceration. Not only might this number not represent actual losses for restitution purposes, *United States v. Carboni*, 204 F.3d 39, 47 (2nd Cir. 2000) ("Although the district court did not err in calculating Fleet's loss for purposes of setting the offense level, we must separately analyze loss with respect to the restitution order because a court's power to order restitution is limited to actual loss."), but by explicitly agreeing to the highest enhancement, Ageloff admitted to causing losses *exceeding* $80 million.

Nevertheless, the government now urges that the district court's approach was sensible given that Ageloff will never be able to pay even a fraction of the $80 million imposed in the restitution order. However, the MVRA makes clear that the defendant's ability to pay should not be considered in determining the amount of restitution. Congress evidently wanted to ensure that victims be fully compensated for a defendant's past crimes if that defendant "unexpectedly inherit[s] money, win[s] the lottery, or otherwise strike[s] it rich." *Grimes*, 173 F.3d at 639; *see also United States v. Vandeberg*, 201 F.3d 805, 812 n.3 (6th Cir. 2000) ("By disregarding the defendant's financial condition for restitution purposes, the MVRA permits full payment of restitution in the possible, but unlikely, event

that a defendant might win a lottery or otherwise strike it rich after sentencing."). Therefore, we hold that even where a defendant's complex fraud scheme results in many victims whose identities and losses are difficult to ascertain, the district court should identify the victims and their actual losses prior to imposing restitution under the MVRA.[5]

Given our holding above, the question becomes whether we can remand the case to the district court to identify the victims and their losses. At oral argument, counsel for Ageloff argued that because an order of restitution under the MVRA must be entered within 90 days of sentencing, we have no choice but to vacate the restitution order without remanding for further proceedings. We do not agree. In *Stevens* we held that the district court was obligated to order restitution within the 90-day period prescribed by the statute. 211 F.3d at 4. However, we also held in *Stevens* that failure to do so can be considered harmless error and a defendant is not entitled to enforce that 90-day limit without showing "that the delay caused prejudice to his or her defense." Id. At 5 (finding harmless error and no prejudice where the defendant caused delay.).

Ageloff surely was not prejudiced by a delay he consented to with the advice of experienced counsel. In fact, the only prejudice Ageloff argues before this court is that the government's inability to prove the identities of the

[5] We express no opinion as to whether the district court may ever extend the 90-day deadline of § 3664 (d) (5), either directly or indirectly through "creative" methods, when faced with a class of identifiable victims so numerous that 90 days is an impossible deadline by which to complete the identification process.

victims and their losses within the 90-day period evidences the government's inability ever to provide such proof. Ageloff argues that "the 90-day window is mandatory, in part, because it forms a benchmark separating the identified and identifiable victims with discrete and provable losses from those who cannot be identified and whose supposed losses are incapable of proof." We have already rejected Ageloff's contention that the victims and their losses in this case are all unidentifiable. We also note that the intent behind the 90-day period was not to protect defendants, but rather to protect victims from the willful dissipation of a defendant's assets. Id. at 5 n.2 ("In our view, the 90-day limit on the entry of a restitution order is more consistent with Congress's concerns about preventing the dissipation of a defendant's assets, than with protecting a defendant from a drawn-out sentencing process."). Ageloff's attempt to invoke this provision in order to avoid paying restitution to the victims of his crime is unavailing.

We therefore vacate the restitution portion of Ageloff's sentence and remand the case for resentencing on restitution. The government has indicated that proceedings to determine the victims and their actual losses are currently under way in the district court. We do not mean to interrupt those proceedings. The district court should simply incorporate the findings from those proceedings into a new restitution order. In view of the time that has elapsed since Ageloff's initial sentencing, we direct the district court to schedule a sentencing hearing on restitution forthwith.

APPENDIX B

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of April, two thousand and three.

Before: Hon. Wilfred Feinberg,
Hon. F.I. Parker,
Hon. Chester J. Straub,
Circuit Judges

Docket No. 01-1367 (L), 01-1481 (CON)

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT CATOGGIO, ROY AGELOFF,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

On consideration whereof, it is here ORDERED, ADJUDGED, and DECREED that the order of restitution of said district courts VACATED and the case REMANDED for

further proceedings in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, clerk
by

Arthur M. Hellar
Motions Staff Attorney

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN District of New York

UNITED STATES OF AMERICA
v.
ROY AGELOFF

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: CR 98-1129(S)(RJD)

JOEL HIRSCHBORN, ESQ.
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1(S) of 34 count superseding indictment.

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Court Number(s)
18 U.S.C. 1962(c) and 1963	RACKETEERING	JUNE 1998	1(S)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) ALL OPEN COUNTS ☐ is X are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 124-58-4567 AUGUST 15 2001
Date of Imposition of Judgment

Defendant's Date of Birth.: SEPTEMBER 19, 1959

Defendant's USM No.: 57431-053
Signature of Judicial Officer

Defendant's Residence Address:

6724 CASA GRANDE WAY
DELRAY BEACH, FLORIDA
33446

RAYMOND J. DEARIE,
UNITED STATES
DISTRICT JUDGE
Name and Title of
Judicial Officer
AUGUST 24, 2001
Date

Defendant's Mailing Address:

6724 CASA GRANDE WAY
DELRAY BEACH, FLORIDA
33446

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prison to be imprisoned for a total term of 95 months.

X The court makes the following recommendations to the Bureau of Prisons:

IF CONSISTENT WITH BUREAU OF PRISONS POLICIES AND PRACTICES THE COURT REOMMENDS THAT DEFENDANT BE DESIGNATED TO A FACILITY IN THE MIAMI FLORIDA REGION AND THAT DEFENDANT PARTICIPATE IN A SUBSTANCE ABUSE PROGRAM. THE COURT FURTHER INVITES CONSIDERATION OF A CAMP DESIGNATE OR FCI, MIAMI FLORIDA

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHALL

By _____
DEPUTY UNITED STATES
MARSHALL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 years

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one

drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☐ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment.;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm

the defendant's compliance with such notification requirement;

ADDITIONAL SUPERVISED RELEASE TERMS

1) Defendant to make full financial disclosure as and when required by and to the court.

2) 30 days from today, $500,000 to be paid in satisfaction of the restitution.

3) 30 days following release from custody, $500,000 to be paid in satisfaction of restitution. Thereafter, at a rate to be adjusted from time to time following full financial disclosure, the sum of $10,000 per month toward the restitution obligation.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$ 80,000,000.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be

paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

RESTITUTION

REFER TO ATTACHED RESTITUTION ORDER.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A **X** Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ E); or

C ☐ Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g.,

30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Restitution Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order; (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

☐ The court adopts the factual findings and guidelines application in the presentence report.

X The court adopts the factual findings and guidelines application in the presentence report, excerpt (see attachment, if necessary):

The court also adopts the addendum to the presentence report dated 1/18/01, the second addendum to the presentence report dated 3/6/01, and the third addendum to the presentence report dated 7/31/01. 2 LEVEL REDUCTION FOR GLOBAL DISPOSITION TOTAL OFFENSE LEVEL: 29

Guideline Range Determined by the Court:

Total Offense Level: 29

Criminal History Category: I

Imprisonment Range: 87 to 108 months

Supervised Release Range: 2 to $ 150,000

X Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 80,000,000.00

☐ Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 23, 1996 pursuant to 18 U.S.C. § 3663(d).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A, of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ROBERT CATOGGIO, *et al*

Defendants

As part of the sentence imposed in the above-captioned case on defendant ROY AGELOFF
It is hereby ORDERED:

1. The defendant shall pay restitution to the victims of the offense of conviction *see* 18 U.S.C. § 366A(a)(2), in the amount of $80,000,000.

2. The defendant shall be jointly and severally liable, *see* 18 U.S.C. § 3664(h), for the full amount of restitution set forth in paragraph one with the following additional defendant(s): ROBERT CATOGGIO.

3. By consent of the parties, the names of the victims to whom restitution is owed and the losses sustained by each individual victim will be set forth in a separate Order of the Court as such time, which may exceed 90 days from the date of this Order, as that information can be ascertained by the Court, on notice to the defendant, based on a proposal that shall be submitted by the United States Attorney.

4. **Restitution pursuant to this Order shall be paid by the defendant as follows:**

(a) the defendant shall make by 9/13/01 the following lump-sum restitution payment (s):

$500,000.00

(b) 30 days following release from custody, $500,000.00 to be paid in satisfaction of restitution. Thereafter, at a rate to be adjusted from time to time following full financial disclosure, the sum of $10,000.00 per month toward the restitution obligation.

(c) 30 days after release from custody, it shall be a condition of the defendant's supervised release that the defendant make the following minimum monthly restitution payments:

All of which is without prejudice to the immediate enforcement of the total restitution judgment as provided in U.S.C. § 3664(m) or other applicable law.

5. The defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. *See* 18 U.S.C. § 3664(k). In addition, as a condition of supervised release, the defendant shall make complete and periodic disclosure of the defendant's assets and income as directed by the Court in consultation with the United States Probation Department.

6. If the defendant knowingly fails to pay restitution required by this Order or by law, the Court may resentence the defendant to any sentence which

might originally have been imposed. *See* 18 U.S.C. § 3614.

7. Any restitution funds paid by the defendant pursuant to this Order shall be held by the Clerk of the Court pending further Order of the Court.

8. The distribution of restitution funds to the victims shall be accomplished according to such plans as shall be proposed by the Office of the United States Attorney and approved by the Court with notice to the defendant.

9. This Order is entered after the Court has fully considered the factors set forth in 18 U.S.C. §§ 3663(a)(1)(B) and 3664(f)(2) that are applicable to this defendant.

Dated: Brooklyn, New York
AUGUST 24, 2001

RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ROY AGELOFF,

Defendant,

---X

DEARIE, District Judge.

The Court is in receipt of defendant's *pro se* submissions, dated October, 1, 2002, October 9, 2002, October 30, 2002, and November 19, 2002. Defendant's conviction is currently on appeal before the Second Circuit. For the reasons stated in the Government's letter of January 15, 2003, this Court recognizes that it does not have jurisdiction to dispose of the matters raised in defendant's submissions while his appeal is pending before the circuit court. Accordingly, these motions and letters will be docketed and held in abeyance until mandate is issued by the Second Circuit.

SO ORDERED.

Dated: Brooklyn, New York
January 24, 2003

RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE